INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Rule involved	3
Statement	3
Argument	11
Conclusion	15

CITATIONS

Cases:

Bocock v. *United States*, 216 F.2d 465	15
People v. *Raffington*, 98 Cal. App. 2d 455, certiorari denied, 340 U.S. 912	13
Pinkerton v. *United States*, 328 U.S. 640	15
Riggs v. *United States*, 280 F.2d 750	13
Schaffer v. *United States*, 362 U.S. 511	12
State v. *Roby*, 194 Iowa 1032	13

Statutes and rules:

18 U.S.C. 371	4
18 U.S.C. 472	4
Federal Rules of Criminal Procedure, Rule 8	3, 11

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 997

LENINE STROLLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1011

VINCENT SERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. No. 997 App. 28; Pet. No. 1011 App. 46; R. 6-

7).[1] The opinion of the district court denying petitioners' motion for a severance (Pet. No. 997 App. 21-24; Pet. No. 1011 App. 31-35; R. 2 (12a-17a)) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1964. Petitions for rehearing were denied on January 21, 1965. By orders of Mr. Justice Stewart, the time for filing the petitions for writs of certiorari was extended to and including March 22, 1965. The petition for a writ of certiorari in No. 997 was filed on March 17, 1965. The petition for a writ of certiorari in No. 1011 was filed on March 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to order a severance of one count, which charged an attempt to sell counterfeit currency by one of the petitioners and by another person who was not named in the conspiracy or other substantive counts.

2. Whether the evidence of petitioner Strollo's guilt was sufficient to support his conviction under Count V.

3. Whether the district court properly instructed the jury on the evidence necessary to prove an attempt.

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[1] "R." refers to the record of the proceedings in the court of appeals. "Tr." refers to the transcript of the trial proceedings.

4. Whether the district court committed plain error in its response to the jury's request for particular information.

5. Whether consecutive sentences could properly be imposed on the conspiracy and substantive counts.

RULE INVOLVED

Rule 8, F. R. Crim. P. provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Ohio under an indictment charging that between November 1, 1962, and February 11, 1963, petitioners, together with Robert Armstrong and John Paladinich,

conspired to pass and sell counterfeit currency in violation of 18 U.S.C. 371 (Count I); that on January 2, 1963, petitioners and Paladinich, with intent to defraud, possessed a counterfeit $10 Federal Reserve note, in violation of 18 U.S.C. 472 (Count II); that on January 4, 1963, petitioners and Paladinich, with intent to defraud, passed a counterfeit $10 Federal Reserve note, in violation of 18 U.S.C. 472 (Count III); and that on January 31, 1963, petitioner Strollo and co-defendant Nick Zappia, with intent to defraud, attempted to sell counterfeit $10 Federal Reserve notes, in violation of 18 U.S.C. 472 (Count V).[2] Petitioner Strollo was sentenced to imprisonment for three years on each of the first three counts, and to five years' probation on Count V, the sentences to run consecutively (Pet. No. 997 App. 26-27). Petitioner Serman was sentenced to consecutive terms of imprisonment for three years on Count I, five years on Count II, and five years on Count III (Pet. No. 1011 App. 36). The court of appeals affirmed.

1. The government's evidence showed that in the fall of 1962 petitioner Serman, an Ohio attorney, spoke with John Paladinich about passing counterfeit money Serman expected to receive (Tr. 2-6). On January 3, 1963, Serman had Paladinich meet him at the home of petitioner Strollo, a mutual acquaintance (Tr. 7-9). There Serman, Strollo, and Paladinich

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[2] Armstrong pleaded guilty to Count I (Tr. 1068). Paladinich pleaded guilty to the first three counts (Tr. 1068). Co-defendant Zappia was convicted on Count V (Tr. 1134). Counts IV and VI were dismissed (Tr. 458, 1109).

counted through several packages of counterfeit $10 Federal Reserve notes, discussed how to make the notes look old, and talked about the method to be used in passing them (Tr. 9-11). Strollo then showed Paladinich a desk drawer containing additional stacks of bills, purportedly a total of $60,000: of that sum $20,000 was in each of three different serial numbers (Tr. 11-12). It was agreed that Paladinich would enlist the aid of his brother, Joseph, in passing the notes, and that the first $7,500 obtained in genuine currency would be given to Serman to pay off the printer (Tr. 12-13, 98). Serman then handed Paladinich $1,000 in counterfeit currency to begin distribution (Tr. 13).

The morning of the next day, January 4, 1963, Paladinich and his brother began passing the notes by making small purchases at retail stores in nearby towns (Tr. 16-19, 155-157). About 11:30 a.m. Serman met them at the railway station in Youngstown (Tr. 20-21, 158-159). Paladinich gave Serman their proceeds, about $80 in genuine currency, together with the items they had purchased (Tr. 22, 160).[3] Thereafter the brothers drove to Warren, Ohio, where each continued to pass counterfeit notes until Joseph was apprehended in a department store (Tr. 23-24, 161-163, 273-274). When Joseph failed to appear at their designated meeting place, Paladinich telephoned Serman that he feared his brother had been caught

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[3] The items were later found by Treasury agents in the basement of Strollo's home (Tr. 61-63, 65-69, 71-73, 171-172, 246, 251-257).

(Tr. 25-30, 299-302). Within twenty minutes both petitioners met Paladinich at the place from which he had called (Tr. 30). Paladinich turned over to Strollo approximately $100 in genuine currency which he had obtained in the Warren area (Tr. 31, 122-123). Shortly thereafter, upon seeing police officers examining Joseph's parked automobile, the three left the vicinity (Tr. 31-32).

The following morning, on January 5, Serman arrived at the Warren city jail to arrange bail for Joseph (Tr. 34, 163, 200-201). In a private conversation he told Joseph to tell the law enforcement officers nothing which might jeopardize the others involved (Tr. 164, 199). Later on January 5, when interviewed by Treasury Department agents, Joseph voluntarily disclosed what he knew concerning the counterfeiting activities and agreed to keep Agent Dixon informed of future developments (Tr. 181, 211).[4] That afternoon, after his release on bond, Joseph met Serman at the latter's office and told him that he had disclosed nothing to the agents (Tr. 165, 197-198, 201-202).

On January 25, 1963, Paladinich and Joseph arranged a meeting with Serman at a store, and inquired about resuming the passing of counterfeit notes (Tr. 37, 215-216). Serman stated it would be too risky to have Joseph pass again, but indicated that Paladinich might (Tr. 166). Serman then placed a call from a nearby wall telephone (Tr. 37, 166-167), said to the

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[4] Between January 4 and February 12, Joseph met or telephoned Agent Dixon 30 to 35 times (Tr. 204, 211, 305-306, 311).

party on the line, "We can handle all you want" (Tr. 216), and then told the brothers that counterfeit money "was again ready to move" (Tr. 167) and that he would communicate with them (Tr. 38). A Treasury agent observed the meeting and overheard part of the conversation (Tr. 214-217).

On January 31, 1963, at about 9:30 p.m., Serman, Strollo, Paladinich, and one Robert Armstrong met in a restaurant and discussed passing a new series of counterfeit notes in Columbus, Ohio (Tr. 40-43, 410-411). They left with the understanding they would meet later at Strollo's bar (Tr. 43-44). Serman, Paladinich, and Armstrong arrived at the bar, waited for Strollo for over two hours, left, and returned some time before 2:00 a.m. to find that Strollo had arrived in the interim (Tr. 44-45, 47-50). Petitioners directed the others to leave for Columbus (Tr. 49). The following morning, in Columbus, Paladinich and Armstrong passed several $10 notes of the new series (Tr. 50, 53-54). At one store Armstrong feared he had been discovered, ran from the store, abandoned some of the remaining counterfeit notes in a nearby washroom, and returned with Paladinich to Youngstown (Tr. 55-58, 74, 239-240). Strollo and Serman there advised them to be quiet and say nothing as Treasury agents had been following them (Tr. 59-60). The notes abandoned by Armstrong were later recovered by federal agents (Tr. 243-244).

The evidence relating to Count V showed that on the afternoon of January 31, 1963, at Strollo's bar, an informant introduced Strollo to an undercover Treasury agent, Leonard Vecchione, who was posing

as an agent for a New York City loan shark (Tr. 320-321, 323, 333). During their conversation Strollo told Vecchione that it was hard to make a living in Youngstown (Tr. 322), and that he was "afraid to make a move because the town was loaded with Feds" (Tr. 344). About 30 to 45 minutes later, Nick Zappia entered the bar, talked to Strollo, and then was introduced to Vecchione by the informant (Tr. 322, 341, 345, 409-410). After talking to Vecchione and learning of his purported livelihood, Zappia asked if he would be interested in obtaining some counterfeit currency (Tr. 323). Vecchione replied that he might, depending on the quality and price (Tr. 323). The price, Zappia said, would be $17 per $100 of face value (Tr. 396). Zappia directed Vecchione to a booth in the back of the bar where they were joined by Strollo (Tr. 323, 410). Strollo produced a counterfeit $10 Federal Reserve note from his pocket (Tr. 324-325), handed it to Vecchione, and asked how much he could use (Tr. 323, 356). The serial number was C 68185774A (Tr. 388). After looking at the note and recognizing it as counterfeit (Tr. 325), Vecchione replied that he would be willing to purchase $300 worth with his own money, but that to buy more he would have to get in touch with his man in New York (Tr. 323-324). Strollo commented that he could not obtain so small an amount as $300 would purchase (Tr. 401). He said he had access to $20,000 in counterfeit notes but would have to check to see how much was then available (Tr. 324, 401). It was agreed that, while checking, he would try to obtain three or four sample notes in order that the uniformi-

ty of their quality might be ascertained by Vecchione (Tr. 324). They arranged to meet at 8:00 p.m. at Vecchione's hotel room (Tr. 324). Although Strollo declined any prepayment, Zappia subsequently accepted a $50 "advance" from Vecchione, to be deducted from the payment "when the deal was consummated" (Tr. 326-327, 360).

At 8 p.m. Zappia arrived at the hotel room (Tr. 325). He informed Vecchione that Strollo's "connection" was out of town, but that the one sample note Strollo had would be given to Vecchione that night so he could take it with him to New York the next morning (Tr. 325-326, 366-367). Shortly before midnight, Strollo drove Zappia back to the hotel (Tr. 411). Zappia handed Vecchione the counterfeit note displayed at the bar, and agreed to telephone him in New York so that the transaction could be consummated (Tr. 326, 397). Zappia then left the building and drove away with Strollo (Tr. 411-413).

2. At trial, during the cross-examination of Joseph Paladinich, the defense elicited testimony that Joseph had given an oral statement to federal agents about 2 or 3 p.m. on January 5, 1963 (Tr. 181-182), and that sometime thereafter (variously stated as January 5 (Tr. 182) and as later in January (Tr. 183-185)) he had signed a typewritten statement setting forth his knowledge of the offenses in question (Tr. 182-184). The typewritten statement, dated February 21, 1963, was marked "Court's Exhibit C", and a copy was furnished to petitioners' counsel (Tr. 185; Pet. No. 1011 App. 37-45). There was no ex-

amination based on the statement. Subsequently, during its deliberations, the jury asked, *inter alia*, "to hear the Court records as to the day and time Joseph Paladinich gave his written statement to the Federal officers" (Tr. 1124).[5] The United States Attorney pointed out that the statement was signed on February 21, and said that an answer as to date would give the impression that no statement was made before that time. The court noted that this was not what the witness had said (Tr. 1128). Petitioners' counsel then entered an objection to any reading of portions of testimony (Tr. 1128-1130) for fear of "undue emphasis on relatively minor points" (Tr. 1129). The court called in the jury and stated: "The Court's recollection is that the date and time of Joseph Paladinich's statement to the Federal officers was January 5th, between 2:00 and 3:00 o'clock in the afternoon" (Tr. 1131). Petitioners' counsel then asked to approach the bench (Tr. 1131-1132). After a short conference the court stated: "Well if there is any question about it the Reporter has it marked. Will you read the testimony of Joseph Paladinich as to when he gave the statement to the Federal officers?" (Tr. 1132). The pertinent testimony was then read to the jury by the court reporter (Tr. 1132).

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[5] They also asked for the "Court records" of the testimony of the Paladinich brothers concerning a meeting with Serman at the railroad station (*i.e.*, before their departure for Warren on January 4).

ARGUMENT

1. There is no merit to petitioners' contentions that the trial court erred in refusing to order a severance and separate trial on Count V (Pet. No. 997 App. 21-25; Tr. 441-442), which charged Zappia and petitioner Strollo with attempting to sell counterfeit $10 notes to Vecchione. All the offenses charged in the indictment involved the disposition of counterfeit currency for profit, and they were, therefore, of sufficiently "similar character" to justify their joinder under Rule 8(a), F.R.Crim.P. Nor can petitioner Serman object to his joinder, under Rule 8(b), with Zappia. The offense charged in Count V was one of the "series of acts or transactions" charged to the named defendants in all the counts of the indictment. Serman was, as the evidence demonstrated (pp. 4-7, *supra*), one of the two central figures in the conspiracy charged in Count I. In the course of that conspiracy and during the time when it was being executed, Strollo and Zappia committed the substantive offense charged in Count V.[6] The jury could find that that offense was, like the offenses in Counts II and III, one of a series committed in furtherance of the unlawful enterprise.

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[6] The close relationship in time, as well as in nature, of the Count V transactions to those of Count I, is demonstrated by the events of January 31. Between 3 and 8 p.m. Strollo was involved with the sale of notes to Vecchione (Tr. 321-325, 366, 409-410); at 9:30 he helped to plan the passing of notes in Columbus (Tr. 40-43, 410-411); at midnight he took Zappia to confer again with Vecchione (Tr. 411-413); and shortly thereafter he sent Paladinich and Armstrong to Columbus to begin passing (Tr. 49-50).

Indeed, even if the evidence had not been sufficient to permit the jury to conclude that the offense committed in Count V was committed in furtherance of the conspiracy, the district court would not have been required to grant a severance unless prejudice were shown. *Schaffer* v. *United States*, 362 U.S. 511. Here there was no such demonstration. The evidence on each count was clear and easily distinguishable, and the trial court carefully instructed the jury to consider the evidence against each defendant on each offense separately (Tr. 418, 1096-1097). Under the circumstances, the court did not abuse its discretion in denying a severance.

2. The evidence was plainly sufficient to sustain petitioner Strollo's conviction for attempting to sell counterfeit $10 notes to Vecchione.[7] Zappia asked Vecchione if he would be interested in buying counterfeit currency at a price of $17 per $100 of face value (Tr. 323, 396). When Vecchione indicated that he

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[7] After first instructing the jury on Count V as it appeared in the indictment (Tr. 1089-1090), the trial court, at the request of Zappia (Tr. 1112) and Strollo (Tr. 1114), later instructed that the evidence disclosed no consummated sale and that the only question for the jury was whether an attempt had been made (Tr. 1113-1114). Petitioner Strollo's statement that the court limited the issue to an attempted sale of a single note (Pet. No. 997, 7, 13) is erroneous. Although the court once made a reference to a "note" (Tr. 1113) instead of "notes", it is clear that no limitation was intended. Indeed the court indicated to the jury that the reason a consummated sale could not be found was that "[t]here was no delivery" (Tr. 1114). As there was a delivery of the sample note, it is apparent that the court was not considering the single, sample note as the subject of the count.

might be, Strollo gave him a counterfeit $10 note, asked how many he wanted, and stated that he had access to $60,000 (Tr. 323-325, 356). Upon discovering later that his supplier was out of town, Strollo had Zappia deliver the sample to Vecchione and make arrangements for a future consummation (Tr. 325-326, 366-367, 397, 411, 413). This was enough to support the jury's finding of an intent to sell and the requisite acts pursuant to that intent. Contrary to petitioner Strollo's suggestion (Pet. No. 997, 12), it is immaterial that Vecchione was not the object of the intent to defraud; it was sufficient if there was an intent to defraud an unknown future transferee or the United States itself. *Riggs* v. *United States*, 280 F.2d 750, 752 (C.A. 5).

3. In instructing the jury that "Whenever the design of a person to commit a crime is clearly shown, slight acts done in the furtherance of that design would constitute an attempt" (Tr. 1092-1093), the district court properly stated the applicable law. See *People* v. *Raffington*, 98 Cal. App. 2d 455, 460, 220 P. 2d 967, certiorari denied, 340 U.S. 912; *State* v. *Roby*, 194 Iowa 1032, 1043, 188 N.W. 709. Moreover, this was but one of several appropriate instructions given by the court in defining the term "attempt" (Tr. 1091-1093). Petitioners entered no objection to any of the definitions given (Tr. 1111).

4. There is no substance to petitioners' contention that the district court committed reversible error in its response to the jury's request "to hear the Court records" as to the date and time of Joseph's written

statement (Tr. 1124). The court intended to respond to the request by having the appropriate portions of the transcript read to the jury (Tr. 1124, 1127-1128, 1130). It was only in deference to petitioners' objection to a reading of the record (Tr. 1128-1130) that the court adopted the alternative procedure of relating its recollection of the testimony (Tr. 1131). After a bench conference, when some question was presumably raised, the court directed that the reporter read to the jury the pertinent portion of the transcript as had originally been requested (Tr. 1132). This, it would appear, resolved any ambiguity as to what dates and times were related in Joseph's testimony.[8]

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[8] Petitioners apparently take the position that a proper response to the jury's request should have include the fact that the typewritten statement produced at trial was actually dated February 21. The jury, however, asked, not for the date of the statement, but "to hear the Court records as to the day and time" of the statement. Petitioners' trial counsel, who had been furnished a copy of the statement (Tr. 185) and knew of that date which had been discussed (Tr. 1128), did not ask that the date be stated. In fact the matter was first raised on a petition for rehearing in the court of appeals (R. 9). Under the circumstances of the case there could have been no prejudice. The record does not show whether the written statement went to the jury with the other exhibits. If it did there was no prejudice, for the statement showed on its face that it covered events as late as February. If the statement was not before the jury, the time it was signed could not be significant since the jury would not know the contents thereof. There had been no examination bringing out the contents of the statements, and no suggestion that Joseph's first oral statement on January 5 differed from the written statement on February 21.

5. The district court did not err in imposing consecutive sentences on the first three counts. Although the substantive offenses were alleged as overt acts of the conspiracy, the indictment charged and the evidence showed a conspiracy of much greater compass than the substantive offenses. There was thus, in this case, a factual as well as legal basis for the application of the well settled rule that conspiracy is a separate offense from the overt acts committed in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640; *Bocock* v. *United States*, 216 F. 2d 465 (C.A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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